

1. The itemization of TTD benefits submitted to Judge Shelor on 1/23/15 was inadvertently missing payments 126 through 150.
2. A true and correct copy of the itemization of TTD paid to claimant is attached hereto and incorporated herein by this reference.

3. It is stipulated that the previously stipulated amount of TTD paid to date in the amount of \$49,060.20 was and remains accurate and correct.
4. Respondent and insurance carrier have paid 210 weeks of TTD covering the following periods:
1/15/09 through 10/28/09; 12/01/09 through 11/15/10; 11/23/10 through 2/24/13.

Based on the supporting documents submitted with this stipulation, the dates TTD was paid is inaccurate. The correct dates of TTD paid are: 1/15/09 through 10/28/09 and 12/01/09 through 2/24/13.

ISSUES

The SALJ found claimant sustained a permanent whole body functional impairment of 9.5 percent for his physical injuries and a 7.5 percent whole body impairment for his psychological injury. The two whole body ratings were combined for an aggregate of 17 percent permanent functional impairment to the whole body. The SALJ also found claimant sustained a 47 percent task loss and a 100 percent wage loss, which were averaged to arrive at a 75 percent work disability.¹

Respondent argues the SALJ erred in determining the nature and extent of claimant's disability and in computing claimant's award. Respondent contends the most credible and accurate impairment ratings are from Drs. Bernhardt (2 percent) and Hughes (no impairment). According to respondent, the SALJ miscalculated claimant's award by commencing TTD benefits and permanent partial disability (PPD) benefits on the date of the accident, resulting in claimant receiving work disability benefits while earning a comparable wage and while receiving TTD. Respondent maintains claimant's award should be calculated by awarding TTD, followed by PPD.

Claimant argues he is entitled to PPD benefits totaling over \$51,000, which, along with the TTD previously paid, "maxes out" claimant's award at the \$100,000 maximum. Alternatively, claimant requests the Board affirm the SALJ's Award. Claimant also contends the plain reading of the law prior to May 15, 2011, required PPD benefits to be paid from the date of the injury, not subsequent to TTD benefits.

The issues are:

1. What is the nature and extent of claimant's disability?
2. Did the SALJ err in computing claimant's award?

¹ The correct average of the task and wage loss percentages is 73.5 percent, not 75 percent.

FINDINGS OF FACT

Claimant began working for respondent in May 2007. His job required working in a warehouse loading trucks, climbing, pulling items off conveyors, sweeping and "housecleaning."

Claimant injured his right foot in a series of repetitive traumas. The parties stipulated claimant's date of accident was April 4, 2008. Claimant testified he noticed pain after his first week working for respondent, and his pain progressively worsened as he continued perform his job. Claimant testified his injury resulted from walking, loading trucks and climbing required by his job. There is no issue regarding the compensability of this claim.

Claimant initially saw Dr. Mead in the emergency room at St. Francis Hospital. Dr. Mead referred claimant to Dr. Priti Lakhani, a podiatrist, who told claimant he had plantar fasciitis. On January 8, 2009, Dr. Lakhani performed an orthotripsy. Claimant testified Dr. Lakhani referred him to Dr. Todd M. VanWyngarden, who scheduled another surgery, which was canceled when respondent sent claimant to Dr. Susan Bonar for treatment.

Dr. Bonar, a foot specialist, recommended claimant not be treated surgically and provided conservative treatment consisting of a walking cast, followed by a walking boot. On August 26, 2009, Dr. Bonar sent claimant for a functional capacity evaluation (FCE). She released claimant on December 11, 2009.

Terrance Pratt, M.D., board certified in physical medicine and rehabilitation, evaluated claimant on December 1, 2009, at the request of claimant's attorney. Dr. Pratt diagnosed right plantar fasciitis and low back pain. The doctor testified claimant's low back pain was aggravated during the FCE and was a natural and probable consequence of his right foot injury. Dr. Pratt recommended physical therapy for claimant's low back and did not offer a permanent impairment rating because claimant had yet to achieve maximum medical improvement (MMI).

Claimant testified respondent then authorized Joseph G. Sankoorikal, M.D., also a practitioner of physical medicine and rehabilitation, who treated claimant from April 19, 2010, to March 11, 2013. The doctor's diagnostic impression was back pain with S1 radiiculopathy. A lumbar MRI scan revealed mild diffuse facet joint arthropathy associated with bilateral foraminal stenosis at L5-S1. Dr. Sankoorikal provided conservative care.

Mark Bernhardt, M.D. a board certified orthopedic surgeon, evaluated claimant on May 22, 2012, pursuant to an order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Dr. Bernhardt's diagnoses were chronic low back pain; left lumbar radiculitis, lumbar spondylosis and chronic right plantar fasciitis. Dr. Bernhardt opined claimant did not have a surgically correctable lesion, and recommended continued pain and muscle relaxant medication.

Dr. Bernhardt determined claimant reached MMI and sustained a 10 percent permanent functional impairment of the right ankle and a 1 percent whole person impairment for the chronic aggravation of his lumbar spondylosis. Dr. Bernhardt converted claimant's lower extremity rating to a 1 percent whole person impairment, which, when combined with claimant's low back impairment, totaled 2 percent to the whole person.

Dr. Bernhardt imposed restrictions of lifting no more than 50 pounds occasionally, no more than 25 pounds frequently and no more than 10 pounds continuously. Dr. Bernhardt testified he reviewed the list of work tasks compiled by vocational consultant Dick Santner and concluded claimant could not perform 2 of the 44 tasks, for a 5 percent task loss.

Daniel Zimmerman, M.D., an internist and a board certified medical evaluator, examined claimant on March 12, 2013, and again on August 1, 2013, at the request of claimant's counsel. Dr. Zimmerman reviewed medical records, took histories and performed physical examinations.

Dr. Zimmerman diagnosed chronic plantar fasciitis of the right lower extremity and chronic lumbar paraspinous myofasciitis superimposed on lumbar disc disease at L3-4. Using the *AMA Guides*,² Dr. Zimmerman rated claimant's chronic plantar fasciitis at 2 percent impairment to the right ankle, which was converted to a 1 percent whole body rating. Dr. Zimmerman rated claimant's chronic lumbar paraspinous myofasciitis superimposed on lumbar disc disease at L3-4 at 16 percent whole body impairment. Combined, Dr. Zimmerman concluded claimant's overall permanent impairment of function was 17 percent to the whole body.

Dr. Zimmerman imposed restrictions of: no lifting more than 20 pounds occasionally and 10 pounds frequently; avoid frequent flexing of the lumbosacral spine and right foot and ankle, including bending stooping, squatting, crawling, kneeling and twisting; avoid sitting more than one hour without changing positions; and avoid standing more than one-half hour before getting off his feet. According to Dr. Zimmerman, claimant was able to walk short distances, but after seven minutes on a treadmill, he developed pain in his lumbar spine and lumbar paraspinous musculature.

Dr. Zimmerman testified he reviewed Mr. Santner's list of 44 work tasks and determined claimant could not perform 39 tasks, for an 87 percent task loss.

Claimant testified he became depressed as a result of his work injuries. He asserted he experienced pain in his foot and back, and wearing his boot prevented use of his ankle, which limited his ability to engage in activities such as hunting and fishing. He

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

had difficulty sleeping and took Temazepam and other medication to help him sleep. Claimant testified he thought of himself as disabled and was off work for a long period of time, which he felt contributed to his depression.

Claimant testified his life was completely turned upside down since the accident and his foot and back injuries made it difficult to find work. Prospective employers asked what he did for the past five years and he was unsure how to respond. Claimant asserted he had difficulty paying bills and was unsure about his future. He was also concerned about his ability to work and engage in other activities. Prior to his accident, claimant testified he had a good attitude about his life, was able to work and could fish and hunt.

Claimant testified Dr. James Eyman, a clinical psychologist, treated him for about two years. Dr. Eyman instructed claimant to find volunteer work and finish his GED. Claimant volunteered at the Topeka Zoo, where he performed duties such as light maintenance and carpentry, and feeding animals. Claimant obtained a paying job at the Topeka Zoo, where he worked from March 18, 2013, through November 10, 2013, averaging 24 hours per week at \$9.36 per hour.

Claimant testified he worked for ATR Enterprises delivering packages from November 25, 2013, through January 1, 2014. Claimant worked five days a week for ATR at \$100 per day, plus \$1 per package for deliveries over 110 packages. Claimant testified he made \$500 per week at ATR.

In December 2013, claimant worked one pay period (two or three nights) for Mainline Printing, where he put coupons into a shrink wrap machine.

Between January 1, 2014 and March 23, 2014, claimant did not work.

On March 23, 2014, claimant started working at Gray Bar in St. Mary's, Kansas. Claimant's job at Gray Bar was checking out tools to Westar employees at Jeffrey Energy Center by scanning the items into a computer at \$10 per hour. Claimant testified he worked for FedEx Ground from April 13 to 19, 2014, for 17.5 hours. Claimant worked at both FedEx and Gray Bar during that week. While working at Gray Bar, claimant made in excess of his earnings from respondent.

Claimant testified he was leaving his job at Gray Bar and intended to move to South Carolina on June 22, 2014, because there were no jobs in Kansas with adequate pay. Claimant asserted he was unsuccessful in his efforts to find employment.

Dr. Robert Schulman, a clinical psychologist, evaluated claimant on October 13, 2010, at the request of claimant's attorney. Dr. Schulman found claimant had dysthymic disorder and generalized anxiety disorder. The doctor testified claimant's depression was related to his work injuries and his inability to work. Claimant's anxiety stemmed from his uncertainty about his work situation and his inability to get his life into focus. According

to Dr. Schulman, claimant's diagnoses and need for treatment were directly related to his work injuries.

According to Dr. Schulman, claimant was not at MMI at the time of his initial evaluation. The doctor recommended consistent psychiatric treatment, including appropriate medication, behavioral therapy and vocational planning. Dr. Schulman testified claimant received the treatment he recommended from Dr. Eyman.

Dr. Schulman evaluated claimant again on February 22, 2013, to provide a rating. Utilizing the second and fourth editions of the *AMA Guides*, Dr. Schulman rated claimant at 10 percent to the whole body. Dr. Schulman related claimant's symptoms and rating directly to his work injuries. Dr. Schulman opined claimant may still benefit from psychoactive medication and the availability of a mental health professional is still important for him.

Beginning April 8, 2011, Dr. Eyman treated claimant for depression and anxiety resulting from his work injuries. Dr. Eyman diagnosed dysthymic disorder and social phobia. The doctor testified he related claimant's dysthymic disorder directly to his work injuries, which also exacerbated his social phobia.

Dr. Eyman started weekly sessions of psychotherapy on May 20, 2011. In the spring of 2012, the frequency of the sessions decreased to twice per month and in April 2013, to once per month. Dr. Eyman last saw claimant on January 10, 2014, and determined claimant would not need future counseling related to his accidental injuries. Claimant improved under Dr. Eyman's treatment.

Using the fourth and second editions of the *AMA Guides*, Dr. Eyman testified claimant sustained a 15 percent whole body psychological impairment related to his vocational event.

Patrick Hughes, M.D., a board certified psychiatrist, evaluated claimant on May 13, 2014, at the request of respondent's attorney. After reviewing records and interviewing claimant, Dr. Hughes found he had no psychiatric impairment related to his work injuries. Dr. Hughes testified he found claimant had a pain disorder with medical and psychological features. That condition is a perception of significant physical pain that has some physical basis, but is significantly exaggerated or magnified by psychological issues. Dr. Hughes diagnosed a resolved adjustment disorder with depressed mood, also called reactive or situational depression.

Dr. Hughes testified claimant's relationship with his girlfriend accelerated his adjustment disorder, but his work injuries and pain did not. The doctor testified claimant's exaggeration or over reporting of pain were caused by his preexisting passive personality.

Dick Santner, a certified vocational rehabilitation counselor, evaluated claimant at the request of claimant's attorney on February 20 and 26, 2013. Mr. Santner focused on claimant's work history for the 15 years preceding his accident and compiled a list of 44 work tasks and the physical demands associated with each task.

PRINCIPLES OF LAW AND ANALYSIS

Under K.S.A. 2008 Supp. 44-501(a), in proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

Pursuant to K.S.A. 2008 Supp. 44-508(g), "burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 44-510e(a) provides in relevant part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

K.S.A. 44-510c(a)(1) and (b)(1) provide the weekly compensation rate for temporary total and permanent total disabilities is computed by multiplying an employee's average weekly wage, computed as provided in K.S.A. 44-511, by 66 $\frac{2}{3}$ percent. The weekly amount resulting from that calculation may not exceed "the dollar amount nearest to 75 % of the state's average weekly wage"

K.S.A. 44-535 provides:

The right to compensation shall be deemed in every case, including cases where death results from the injury, to have accrued to the injured workman or his dependents or legal representatives at the time of the accident, and the time limit in which to commence proceedings for compensation therefor shall run as against him, his legal representatives and dependents from the date of the accident.

In *Love*,³ the Kansas Court of Appeals stated:

³ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl. ¶ 1, 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

Functional Impairment

The Board finds no error in the SALJ's finding that claimant sustained a permanent functional impairment of 17 percent to the whole body, consisting of a 9.5 percent impairment for claimant's physical injuries and a 7.5 percent impairment for his psychological injury. The SALJ placed equal weight on the ratings in the record by averaging them to arrive at the extent of claimant's functional impairment. The Board finds the rating experts were qualified to express their opinions regarding impairment and the method used by the SALJ to determine claimant's impairment was reasonable under the circumstances of this claim and amply supported by a preponderance of the credible evidence. The specific dates for each period of functional disability are set forth on the "Computation of Award" section of this order.

Work Disability

There were only two task loss opinions in the record. The opinions were widely disparate, consisting of Dr. Bernhardt's 5 percent and Dr. Zimmerman's 89 percent. The SALJ placed equal weight on both opinions and found claimant's task loss was 47 percent. The SALJ apparently found the two task loss opinions equally credible, or perhaps equally lacking in credibility, and determined claimant's task loss was mid-way between the extremes. Under the circumstances of this claim, the Board can find no error in the SALJ's task loss finding and adopts the same.

The Board also agrees with the SALJ's finding that claimant sustained a wage loss and is entitled to PPD benefits for work disability. However, claimant's work disability is based upon various percentages of wage loss he sustained at different periods of time.

The parties filed a stipulation with the ALJ on October 3, 2014, addressing the periods claimant worked and was unemployed. The Board notes inconsistencies between the stipulation and the documents submitted in support of the stipulation. The Board used such documents, along with the stipulation and the testimony in the record in arriving at its findings.

For 40.86 weeks, claimant had a 37.5 percent work disability (47 percent task loss + 28 percent wage loss = 75 divided by 2); for 34 weeks, a 48 percent work disability (47 percent task loss + 49 percent wage loss = 96 divided by 2); and for 27.28 weeks, a 73.5 percent work disability (47 percent task loss + 100 percent wage loss = 147 divided by 2)

for a total of 102.14 weeks of PPD based on work disability. The specific dates for each period of work disability are set forth on the “Computation of Award” section of this order.

Computation of Award

Respondent maintains the award was incorrectly calculated because claimant was awarded PPD and TTD for the same weeks. The Board agrees. A claimant cannot be temporarily and permanently disabled at the same time. Further, awarding temporary and permanent disability benefits for the same weeks results in a claimant receiving more than the weekly maximum rate, in violation of K.S.A. 44-510e(a)(1) and K.S.A. 44-510c. Moreover, the Board has consistently held that such benefits cannot be awarded for the same period.⁴

The Board finds claimant’s award is computed based upon the following periods of disability:

1. For April 4, 2008, through January 14, 2009, a period of 40.86 weeks, claimant sustained a 37.5 percent work disability.
2. For January 15, 2009, through October 29, 2009, a period of 41.14 weeks, claimant received TTD.
3. For October 30, 2009, through November 30, 2009, a period of 4.57 weeks, claimant sustained a 73.5 percent work disability.
4. For December 1, 2009, through February 24, 2013, a period of 168.86 weeks, claimant received TTD.
5. For February 25, 2013, through March 17, 2013, a period of 3 weeks claimant sustained a 73.5 percent work disability.
6. For March 18, 2013, through November 10, 2013, a period of 34 weeks, claimant sustained a 48 percent work disability.
7. For November 11, 2013, through November 24, 2013, a period of 2 weeks claimant sustained a 73.5 percent work disability.

⁴ *Jackson v. Aldersgate Village*, No. 1,046,584, 2011 WL 5341316 (Kan. WCAB Oct. 25, 2011); *Felipe v. Creekstone Farms Premium Beef*, No. 1,025,045, 2008 WL 375797 (Kan. WCAB Jan. 30, 2008); *Johnstone v. Lifeline Systems, Inc.*, No. 1,009,971, 2005 WL 1983397 (Kan. WCAB July 01, 2005); *Frazee v. Golden Wheat, Inc.*, No. 201,840, 2001 WL 1725694 (Kan. WCAB Dec. 31, 2001); *Lopez v. The Capper Foundation*, No. 220,869, 2000 WL 235509 (Kan. WCAB Feb. 29, 2000)

8. For November 25, 2013, through December 31, 2013, a period of 5.29 weeks, claimant earned a comparable wage and is entitled to functional disability.
9. For January 1, 2014, through March 22, 2014, a period of 11.57 weeks claimant sustained a 73.5 percent work disability.
10. For March 23, 2014, through June 22, 2014, a period of 13.14 weeks, claimant earned a comparable wage and is entitled to functional disability.
11. For June 23, 2014, through August 4, 2014, a period of 6.14 weeks claimant sustained a 73.5 percent work disability.
12. For August 5, 2013 through December 15, 2014, a period of 18.97 weeks, claimant earned a comparable wage and is entitled to functional disability.

Claimant is entitled to an award of TTD for 210 weeks, 37.4 weeks of PPD based on a 17 percent whole body impairment of function, 40.86 weeks of PPD based on a 37.5 percent work disability, 27.28 weeks of PPD based on a 73.5 percent work disability, and 34 weeks of PPD based on a 48 percent work disability. The specific calculations are set forth in the "AWARD" section of this Order.

CONCLUSIONS

1. Claimant sustained a 17 percent whole body functional impairment and work disabilities of 73.5 percent, 37.5 percent and 48 percent.
2. The SALJ erred in awarding PPD benefits for the same weeks TTD was paid. The correct computation is set forth below.

AWARD

There is due and owing to claimant 210 weeks of temporary total disability compensation at the rate of \$233.62 or \$49,060.20, 37.4 weeks of permanent partial disability at the rate of \$233.62 or \$8,737.39 based on a 17 percent functional disability, 40.86 weeks of permanent partial disability at the rate of \$233.62 or \$9,545.71 for a 37.5 percent work disability, 27.28 weeks of permanent partial disability at the rate of \$233.62 or \$6,373.15 for a 73.5 percent work disability, and 34 weeks of permanent partial disability at the rate of \$233.62 or \$7,943.08 for a 48 percent work disability, for a total award of \$81,659.53, all of which is due and owing and ordered paid in one lump sum, less amounts previously paid.

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated February 2, 2015, is modified as set forth in this Order.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Jerry Shelor, SALJ